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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
12

13)
14 UNITED STATES OF AMERICA,)
15 Plaintiff,)
16 v.)
17 FE S. GARRETT)
18 Defendant.)
19 _____)

Criminal Case No. 08CR0918-L

GOVERNMENT'S TRIAL MEMORANDUM

DATE: September 9, 2008
TIME: 9:00 a.m.

20 The United States of America, by and through its counsel, Karen P. Hewitt, United States
21 Attorney, and Christopher S. Strauss and Elizabeth C. Hadden, Special Assistant U.S. Attorneys,
22 hereby files its Trial Memorandum.

23 **I.**

24 **STATUS OF THE CASE**

25 **A. Trial Status**

26 Trial is set to begin on Tuesday, September 9, 2008, in San Diego, before the Honorable
27 M. James Lorenz, United States District Judge. Estimated trial time for the Government's case is
28 eight days.

1 **B. Indictment**

2 The Superseding Indictment charges defendant with the following offenses:

3 Counts One through Twenty allege aiding and assisting in the preparation and
4 presentation of false tax returns, in violation of Title 26, United States Code Section
5 7206(2);

6 Counts Twenty-one through Twenty-four allege filing false personal income tax
7 returns for the years 2001, 2002, 2004 and 2005, in violation of Title 26, United States
8 Code Section 7206(2);

9 Counts Twenty-five through Thirty allege failing to pay federal income tax, in
10 violation of Title 26, United States Code Section 7203.

11 **C. Custody Status**

12 Defendant has been detained since being arrested on March 28, 2008. The Government
13 orally moved for detention on April 1, 2008 (Doc. #7). On April 4, 2008, Magistrate Judge
14 Anthony J. Battaglia denied the Government's motion to detain defendant, and set the following
15 bond requirements: (1) \$100,000 P/S secured by real property, (2) Nebbia / examination prior to
16 release and conditions filed. To date, defendant has not met the conditions set. (Docs. #25, 34, and
17 36).

18 **D. Interpreter**

19 The Government anticipates that a Tagalog interpreter will be necessary for one
20 Government witness at trial.

21 **E. Jury Waiver**

22 No jury waiver has been filed.

23 **F. Pretrial Motions**

24 The Court set a motions hearing on September 3, 2008, at 9:00 A.M. The Court granted the
25 Government's Motion for an Order Allowing Limited Disclosure of Tax Return Information (Doc.
26 #14) and the Government's Motion for Disclosure of Grand Jury Information (Doc #16). The
27 Court also granted the Joint Motion to Continue Pretrial Proceedings and Trial Date Pursuant to
28 Speedy Trial Act (Doc #30). The defendant's oral motion to proceed *pro se* was granted on May

29, 2008. (Doc. #22).

The following defense motions are pending (Doc. #41):

- (1) To Compel Discovery and Preserve Evidence;
- (2) To Suppress Statments;
- (3) To Suppress Evidence;
- (4) Dismiss Indictment Due to Misinstruction of Grand Jury;
- (5) Dismiss Indictment Due to Undue Delay in Filing the Charges;
- (6) Dismiss Indictment Due to Selective Prosecution;
- (7) Dismiss the Indictment Due to the Government Misleading the Grand Jury;
- (8) Dismiss Indictment for Prosecutorial Misconduct;
- (9) To Order the Government to Disclose Identity of Informant; and
- (10) To Produce Witness and Exhibit List
- (11) Motion *in Limine* to Preclude 404(b) Evidence (Doc. #53)
- (12) Motion *in Limine* to Allow the Defendant to Voir Dire the Jury
- (13) Motion *in Limine* to Preclude any Statement Made by the Defendant's Husband, Gregory Garrett, Sr.

The following Government motions are pending:

- (1) Motion in Limine to Admit Statements of Gregory Garrett, Sr. (Doc. #43);
- (2) Motion in Limine to Admit Business Records (Doc. #49).

G. Witnesses

The Government expects to call approximately twenty-six witnesses in its case in chief.

H. Attorneys

The United States will be represented by Special Assistant United States Attorneys Christopher S. Strauss and Elizabeth C. Hadden. Defendant is representing herself; Erica K. Zunkel, Federal Defender, was appointed standby counsel by Magistrate Judge Battaglia on May 29, 2008.

I. Discovery

Ongoing discovery is being provided to the defendant by the Government. The

1 Government has requested reciprocal discovery, but the defense has provided none. The
2 Government has provided the *curriculum vitae* of summary expert witness Emeterio Ramirez as
3 well as an explanation of the bases of his expected testimony. The Government has also provided
4 draft summary schedules the Government intends to introduce pursuant to Fed. R. Evid. 1006 as
5 well as draft tax computations.

6 II.

7 STATEMENT OF FACTS

8 The United States expects to prove the following facts, among others, at trial:

9 A. Overview

10 Fe S. Garrett was a self-employed individual who earned and received income from two
11 businesses: a business in which she earned and received fees for providing various accounting,
12 bookkeeping and tax-related services to clients, including tax return preparation services; and a
13 real estate sales and loan-related business in which she earned and received fees and commissions
14 for providing various services to clients, including mortgage re-financing services. In her tax
15 return preparation business, Garrett prepared false and fraudulent federal income tax returns that
16 claimed overstated and/or fabricated itemized deductions and child care expenses. Garrett also
17 filed her own false and fraudulent federal income tax returns for tax years 2001, 2002, 2004 and
18 2005 that understated her business gross receipts and for tax years 2001 and 2002, falsely claimed
19 the Head of Household status, which is a filing status reserved for unmarried persons or married
20 persons who do not live together. Finally, Garrett failed to pay approximately \$279,000 in federal
21 income tax she admitted she owed on her filed federal income tax returns for tax years 2001
22 through 2006, inclusive.

23 B. Preparation of False Returns for Clients

24 The tax returns at issue were prepared by the defendant, although Garrett did employ
25 others, including her husband, children and relatives, to assist her in her tax preparation business.
26 Defendant's clients will testify that they did not provide inflated amounts of itemized deductions
27 to the defendant and did not authorize the defendant to inflate and/or fabricate itemized
28 deductions. Defendant also fabricated a child care provider for one client in order to further

1 reduce the client's tax liability, and she inflated rental real estate expense on a Schedule E for
2 another client.

3 On April 2, 2003, an undercover Internal Revenue Special Agent went to the defendant's
4 business to have a tax return prepared for tax year 2002. The defendant told the undercover agent,
5 among other things, that she was experienced in how to "win" and audit, that she would look at
6 every return and redo it to achieve the maximum deduction. When the undercover agent told the
7 defendant that she had to pay tax in the previous year, the defendant told her that if the defendant
8 had prepared that return, she would have received a refund. The defendant told the agent that by
9 merely looking at a tax return, she could at least double, and usually triple or quadruple the amount
10 of a refund on a tax return prepared by someone else. The defendant explained that she put the
11 "perfect makeup" on the tax returns she prepared. The defendant explained that "the perfect
12 makeup will make your refund very good." The defendant also described inflating deductions on a
13 prior client's tax return to lower the tax liability, and fabricating a business for another client.

14 On August 6, 2003, the undercover agent returned to the defendant's business to pick up the
15 tax return, which showed a refund amount of \$1,396. The agent met with the defendant's husband,
16 an unpaid employee, to discuss the return. The return contained fabricated itemized deductions for
17 charitable contributions, employee business expenses and child care expenses. When the agent
18 questioned those deductions, the defendant's husband/employee explained that these deductions
19 were the defendant's "loopholes" and that she invented those deductions for everyone. He also
20 gave the undercover agent a summary sheet and explained that if the agent had taken her tax return
21 to H&R Block, she would have owed \$3,534 instead of getting a \$1,396 refund.

22 Defendant initially told Special Agents that (1) she would include "realistic" employee
23 expenses on a client's tax return whether or not the client incurred the expense; (2) that if a client
24 did not remember an amount of cash donations, she would figure out a percentage to deduct on the
25 tax return; (3) that she would deduct other amounts for donations whether or not the client had any
26 verification of the donation. Once the Special Agents told the defendant that an undercover agent
27 had been sent to have a tax return prepared and that the tax return was false, the defendant admitted
28 that she falsified charitable contributions and employee business expenses on her clients' tax

1 returns. The defendant's explanation was that she inflated deductions for her clients because they
2 worked hard and deserved it.

3 In a second interview, the defendant admitted fabricating child care provider names on her
4 clients' tax returns..

5 **C. Evidence of the Undercover Investigation**

6 The undercover agent tape-recorded each meeting with the defendant and other members of
7 Faye's Tax Service, including her husband. Portions of these recordings, with transcripts, will be
8 presented at trial. All of the recordings have been provided to the defendant in discovery. In
9 addition, the fraudulent tax return prepared for the undercover agent by the defendant and related
10 documents will be introduced.

11 **D. The Defendant's Own False Tax Returns and Failure to Pay Tax**

12 The defendant utilized a different method to under report her own federal income tax
13 liabilities. Garrett simply omitted gross receipts she earned from her businesses in tax years 2001,
14 2002, 2004 and 2005 and, for the years 2001 and 2002, Garrett also fraudulently claimed the Head
15 of Household status despite being married. Head of Household filing status is reserved for
16 unmarried persons (or married persons who lived apart for the last six months of a tax year) and
17 who paid over half the expenses of maintaining a household with a qualifying dependent, such as a
18 child or dependent parent. For tax years 2001 through 2006, defendant and her husband filed
19 separate tax returns.

20 An analysis of the defendant's bank accounts was conducted in order to determine the
21 defendant's true business gross receipts. The Government expects the evidence to establish that the
22 defendant failed to report business gross receipts on her filed federal income tax returns in
23 approximate amounts of \$38,226 in 2001, \$162,283 in 2002, \$85,245 in 2004, and \$26,400 in 2005.

24 In addition to establishing that the defendant filed false tax returns that under reported her
25 business gross receipts, evidence at trial will establish that the defendant has failed to pay any
26 income taxes for the years 2001 through 2006 on income she did report. The defendant filed
27 federal income tax returns for tax years 2001, 2002, 2003, 2004, 2005, and 2006 on which she self-
28 reported income tax due of \$5,714, \$9,585, \$187,319, \$15,072, \$39,647, and \$29,125, respectively.

1 Certified official records of the Internal Revenue Service will establish that as of July, 2008
2 defendant has not made any payments of income tax for tax years 2001 through 2006.

3 **III**

4 **WITNESSES**

5 The following witnesses (in alphabetical order) may be called by the United States to testify
6 at trial.

7 IRS Special Agent Maria Alvarez

8 Zenaida Aquinde

9 Pepito Aure

10 Christopher Aure

11 IRS Special Agent Cecilia Braga

12 IRS Special Agent Robert Brana

13 Antonio Cruz

14 Michelle Davis

15 Nicole De Lahay

16 Zenaida Diomino

17 Rosalina Dimalig (formerly Rosalina Colocado)

18 Homer Dizon

19 Sonny Domingo

20 Lorenda Fabro

21 Gregory Garrett, Jr.

22 William Geideman

23 IRS Special Agent Adam Gigler

24 IRS Revenue Officer Sharon Hill

25 IRS Special Agent Cherry Jiminez

26 IRS Computer Information Specialist Roger Lange

27 Myleen Larson

28 Jerry McCawley

1 Thomas Miller
2 IRS Revenue Agent Emeterio Ramiriez
3 IRS Special Agent Edward Reyes
4 Rick Schuller

5 **IV**

6 **EXHIBITS**

7 The data and records underlying the summary charts and computations were provided
8 during discovery; draft summary charts and draft tax computations were provided to defendant on
9 August 12, 2008. A set of pre-marked exhibits will be provided to defendant prior to trial. A final
10 exhibit list will be provided to the clerk of the court at the time of trial. The United States reserves
11 the right to supplement the exhibit list during the trial. Any changes will be brought to the attention
12 of the defendant, stand-by counsel and the court promptly and any additional exhibits will be
13 provided.

14 The Court has approved the Government's use of a computer-based trial presentation
15 system to display its exhibits to the jury. The system will be installed prior to trial.

16 **V**

17 **JURY INSTRUCTIONS**

18 The United States will submit its proposed jury instructions on September 9, 2008 to the
19 Court and defendant. The United States intends to submit instructions that apply specifically to the
20 issues in this case and respectfully requests that the Court give any additional general instructions
21 that it deems appropriate. The Government requests leave to offer additional instructions during
22 the course of the trial that may become appropriate.

23 **VI**

24 **STIPULATIONS**

25 The Government requested that defendant stipulate to the foundation of undisputed and
26 routine business records, including bank records and records of title companies to avoid the
27 necessity of calling numerous records custodians. To date, the defendant has refused to stipulate to
28 the authenticity of any business records. However, as set forth in the Government's Motion in

1 Limine to Introduce Business Records (Doc. # 49), business records of banking institutions and title
2 companies are admissible if certified pursuant to Fed. R. Evid. 803(6) and 902(11).

3 VII

4 LEGAL ISSUES

5 A. Aiding and Assisting in the Preparation of False Tax Returns, 26 U.S.C. § 6 7206(2)

7 Title 26, United States Code Section 7206(2), provides in pertinent part,

8 Any person who...willfully aids or assists in, or procures, counsels, or
9 advises the preparation or presentation under, or in connection with
10 any matter arising under, the internal revenue laws, of a return,
11 affidavit, claim, or other document, which is fraudulent or is false as
12 to any material matter, whether or not such falsity or fraud is with the
13 knowledge or consent of the person authorized or required to present
14 such return, affidavit, claim, or document...shall be guilty of a felony
15 and, upon conviction thereof, shall be fined not more than
16 \$100,000...or imprisoned not more than 3 years, or both, together
17 with the costs of prosecution.

18 1. Essential Elements

19 The essential elements of assisting the preparation of a false return are:

- 20 a. the defendant aided, assisted, or otherwise caused the preparation and
21 presentation of a return;
- 22 b. that the return was fraudulent or false as to a material matter, i.e.
23 something necessary to determine whether tax is owed; and
- 24 c. the act of the defendant was willful.

25 United States v. Salerno, 902 F.2d 1429, 1432 (9th Cir.1990); Ninth Circuit Model Criminal Jury
26 Instructions, 9.38. The Ninth Circuit has held that the filing of a false return is an element of a §
27 7206(2) offense. United States v. Dahlstrom, 713 F.2d 1423,1429 (9th Cir. 1983). Although the
28 filing of a return is necessary for the completion of the offense, the defendant does not have to
actually file the return as long as the defendant's conduct led to the filing of the false tax return.
United States v. Kellogg, 955 F.2d 1244, 1249 (9th Cir. 1992).

A person acts "willfully" by voluntarily and intentionally assisting or advising another to do
something that the person knows disobeys or disregards the law. A person does not act "willfully"
if the person acts as a result of a good faith misunderstanding of the requirements of the law. Ninth

1 Circuit Model Criminal Jury Instructions, 9.38 (2003). It is not a defense that the defendant
 2 believed the income tax laws are wrong or unconstitutional. Cheek v. United States, 498 U.S. 192,
 3 205-06 (1991). Business experience is probative of willfulness. United States v. Smith, 890 F.2d
 4 711, 715 (5th Cir. 1989) (defendant's experience as an entrepreneur pointed to willfulness rather
 5 than honest error).

6 2. Taxpayer's Knowledge of Falsity of Tax Return is Not Relevant.

7 The Government is not required to prove that the taxpayer knew that the return was false.
 8 As Justice Learned Hand stated when discussing the statutory predecessor of Section 7206(2),

9 The purpose was very plainly to reach the advisors of taxpayers who got up their
 10 returns, and who might wish to keep down the taxes because of the credit they would
 get with their principals, who might be altogether innocent.

11 United States v. Kelley, 105 F.2d 912, 917 (2d Cir. 1939). Conversely, § 7206(2) explicitly
 12 provides that a person who aids or assists in the preparation of a false tax return can be criminally
 13 liable "whether or not such falsity or fraud is with the knowledge or consent of the person
 14 authorized or required to present such return."

15
 16 4. Signing of Document Not Required in Section 7206(2)

17 Section 7206(2) prohibits the assisting or aiding, procuring, counseling or advising the
 18 preparation or presentation of a false document. The fact that the defendant does not actually sign
 19 the document "is not material." United States v. Crum, 529 F.2d 1380, 1382 n.4 (9th Cir. 1976).

20 5. Omitted Receipts and Fabricated Deductions Material Items

21 Omitted gross receipts are material matters for purposes of criminal tax violations. United
 22 States v. Marashi, 913 F.2d 724, 736 (9th Cir. 1990).

23 **B. Subscribing and Filing False Tax Returns, 26 U.S.C. § 7206(1)**

24 Title 26, United States Code Section 7206(1), provides in pertinent part:

25 Any person who willfully makes and subscribes any return, statement, or other
 26 document, which contains or is verified by a written declaration that it is made
 27 under the penalties of perjury, and which he does not believe to be true and correct
 as to every material matter . . . shall be guilty of an offense against the United
 States.

28 1. Essential Elements

1 The essential elements of willfully failing to pay tax are:

- 2 a. First, the defendant made and signed a tax return that she knew
- 3 contained false information as to a material matter;
- 4 b. the return contained a written declaration that it was being signed
- 5 subject to the penalties of perjury; and
- 6 c. in filing the false tax return, the defendant acted willfully.

7 Ninth Circuit Model Criminal Jury Instructions, 9.37 (2003).

8 2. Omitted Receipts and Fabricated Deductions Material Items

9 False information on a tax return is material if it has a natural tendency to influence or is
 10 capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax
 11 return or a related return. Ninth Circuit Model Criminal Jury Instructions, Comment (citing
 12 United States v. Gaudin, 515 U.S. 506, 509 (1995)). Materiality is a question of fact for the jury.
 13 United States v. Uchimura, 125 F.3d 1282, 1284 (9th Cir. 1997). Omitted gross receipts have been
 14 found to be material matters for purposes of criminal tax violations. United States v. Marashi, 913
 15 F.2d 724, 736 (9th Cir. 1990).

16 3. Bank Deposits Method of Proof

17 The Government will use the bank deposits method of proof to establish the amount of
 18 defendant's business gross receipts. This method of proof is an indirect method of proving
 19 receipts and income. It is used to establish unreported receipts and income in cases where direct
 20 methods of proof are unavailing. United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985);
 21 United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984); ; United States v. Abodeely, 801
 22 F.2d 1020, 1023 (8th Cir. 1986); United States v. Helina, 549 F.2d 713, 720 (9th Cir. 1977). In
 23 order to prove unreported gross receipts, the Government must initially introduce evidence to
 24 show "(1) that, during the tax years in question, the taxpayer was engaged in an income producing
 25 business or calling; (2) that he made regular deposits of funds into bank accounts; and (3) that an
 26 adequate and full investigation of those accounts was conducted in order to distinguish between
 27 income and non-income deposits." Stone, 770 F.2d at 844 (quoting United States v. Morse, 491
 28 F.2d 149 (1st Cir. 1974)). The bank deposits method of proof proceeds in the following manner:

The bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and the end of the year. Non-income deposits are then excluded, and non-deposited income is included. This constitutes a reconstructed gross income.

Soulard, 730 F.2d at 1296 n.1 (quoting United States v. Hall, 650 F.2d 994, 996 n.4 (9th Cir. 1981)). In Soulard, a tax evasion case, the court explained that the bank deposits method of proof continues by calculating taxable income. Id. In a false return case, the Government is not required to prove an actual tax due. United States v. Scholl, 166 F.3d 964, 980 (9th Cir. 1999) (“Whether there was an actual tax deficiency is irrelevant because the statute is a perjury statute.”) (citation omitted).

The Government has alleged that the defendant failed to report all of her business gross receipts. Although an actual tax due is not an essential element of a charge pursuant to § 7206(1), the Government will produce evidence of the tax effect of the understatement in gross receipts as it bears on the issue of materiality. See Id. (noting that information is material if it is necessary to a determination of whether income tax is owed).

4. Proof of one False Item is Sufficient

When a single count of a violation of § 7206 charges multiple false items, the government does not have to prove all of the false items. Proof of one materially false item is sufficient. See Griffin v. United States, 502 U.S. 46 (1991) (when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient as to any one of the acts charged); United States v. Helmsley, 941 F.2d 71, 91 (2d Cir. 1991) (finding that where deductions taken by taxpayer were either overstated or mischaracterized, in either case entry was “false and fraudulent”).

C. Willfully Failing to Pay Tax, 26 U.S.C. § 7203

Title 26, United States Code Section 7203, provides in pertinent part:

Any person required under this title to pay any . . . tax, . . . who willfully fails to pay such . . . tax, . . . at the time . . . required by law or regulations . . . shall be guilty of an offense against the United States.

1. Essential Elements

The essential elements of willfully failing to pay tax are:

- a. the defendant owed income tax;
- b. the defendant failed to pay the tax by the time required by law; and
- c. the defendant acted for the purpose of evading her duty under the tax laws and not as a result of accident or negligence.

Ninth Circuit Model Criminal Jury Instructions, 9.36 (2003).

2. Ability to Pay

In order to prove a defendant willfully failed to pay tax, the Government is not required to prove that the defendant had the ability to pay the tax when the tax became due. See United States v. Easterday, ____ F.3d ____, 2008 WL 3876593, at *1, 5 (9th Cir. August 22, 2008). A defendant's inability to pay the tax due is not a defense to a charge of willful failure to pay tax and the defense is not entitled to an instruction on her inability to pay. Id., at *6. Willfulness is an intentional violation of a known legal duty. United States v. Pomponio, 429 U.S. 10, 12 (1976). If a defendant knows that they owe tax and she does not pay the tax, the defendant has acted willfully. Easterday, 2008 WL 3876593, at *1.

VIII

EVIDENTIARY ISSUES

A. Summary Witness Testimony and Summary Schedules

Near the end of its case, the United States will call as a summary witness, IRS Revenue Agent Emeterio Ramirez, who is trained in accounting and the computation of tax liabilities. This witness will provide an analysis of all the witness testimony at trial, summaries of voluminous bank records, summaries of financial records introduced into evidence, and explain the tax consequences of the Government's evidence. Revenue Agent Ramirez will provide Rule 1006 summaries of voluminous records and provide summary tax computations and schedules pursuant to Fed. R. Evid. 611(a).

1. Fed. R. Evid. 1006 Summaries of Voluminous Evidence

The Rule 1006 summaries must summarize information which is voluminous, admissible, and available for inspection. City of Phoenix v. Com/Systems, Inc., 706 F.2d 1033, 1038 (9th Cir. 1983); United States v. Johnson, 594 F.2d 1253, 1255 (9th Cir. 1979). While the underlying

documents must be admissible, they need not be admitted at trial. Johnson, 594 F.2d at 1257, n. 6; United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988). Summaries of voluminous records that are introduced pursuant to Fed. R. Evid. 1006 are themselves the evidence and are therefore admissible at trial. See United States v. Baker, 10 F.3d 1374, 1411 (9th Cir. 1993) ("this Circuit has often allowed the use of summary charts and summary witness testimony based on testimonial evidence (most commonly in tax cases)"), cert. denied, 513 U.S. 934 (1994), *overruled on other grounds*, United States v. Nordby, 225 F.3d 1053 (9th Cir 2000); United States v. Wood, 943 F.2d 1049, 1053 (9th Cir. 1991).

The introduction of summary witness testimony and summary schedules has been approved by the Ninth Circuit in tax cases, United States v. Marchini, 797 F.2d 759, 756-766 (9th Cir. 1986); United States v. Greene, 698 F.2d 1364, 1367 (9th Cir. 1983); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964). "The fact of a tax due and owing may be established by documentary evidence of tax liability, accompanied by a summary by an expert." United States v. Voorhies, 658 F.2d 710, 715 (9th Cir. 1981). A summary witness draws conclusions from the evidence presented at trial. United States v. Esser, 520 F.2d 213, 217-18 (7th Cir. 1975). A summary witness may be used to help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses. See United States v. Baker, 10 F.3d 1374, 1411 (9th Cir. 1983). The summary witness may review the evidence in a manner that advocates the Government's theory of the case, and need not give effect to the contentions of the defendant. Barsky, at 181; United States v. Moore, 997 F.2d 55, 58-59 (5th Cir. 1993). Copies of the summaries may be published to the jury while the expert testifies concerning them. Id.

The Government will offer summary schedules of voluminous bank records of bank accounts into which defendant deposited her business receipts from her tax return preparation business and her mortgage refinance business in tax years 2001, 2002, 2004, and 2005. They are records that are routinely kept by banks in the normal course of business and so fall under the hearsay exception of Rule 803(6). Additionally, the Government has filed certifications of domestic business records pursuant to Fed. R. Evid. 902(11) with the Court to establish the

1 admissibility of the bank records. (Rec. Doc. No. 49). The underlying bank records have been
2 available to the defense since the beginning of this case.

3
4 2. Summary Witness Testimony and Other Summary Schedules

5 In addition to testifying concerning the Rule 1006 summaries, Revenue Agent Ramirez will
6 also present to the jury various tax computations and summaries that he has prepared from the
7 evidence that was admitted during trial. The purpose is to assist the Court and the jury through
8 what may be at times complex financial evidence.

9 Rule 611(a) of the Federal Rules of Evidence authorizes the court to "exercise reasonable
10 control over the mode...of...presenting evidence so as to (1) make the... presentation effective for
11 the ascertainment of the truth, [and] (2) avoid needless consumption of time." United States v.
12 Gardner, 611 F.2d at 776 (9th Cir. 1980) (summary chart admissible in tax evasion case under
13 Rule 611(a)); United States v. Paulino, 935 F.2d 739, 752-54 (6th Cir. 1991) (testimony of
14 nonexpert summary witness regarding cash generated from cocaine sales in drug conspiracy case
15 admissible under Rule 611(a) where trial court gave limiting instruction and defense had full
16 opportunity to cross-examine); United States v. Scales, 594 F.2d 558, 563-64 (6th Cir. 1979)
17 (summaries of testimonial evidence designed "to aid the jury in its examination of the evidence
18 already admitted" do not come within Rule 1006, but are authorized by Rule 611(a)), 5 Jack B.
19 Weinstein and Margaret A. Berger, Weinstein's Evidence, at ¶ 1006[03] (summary "prepared by a
20 witness from his own knowledge to assist the jury in understanding or remembering a mass of
21 details... is admissible, not under Rule 1006, but under such general principles of good sense as are
22 embodied in Rule 611(a)").

23 Revenue Agent Ramirez' summaries will include a summary of the bank deposits analysis,
24 a summary of defendant's unreported gross receipts, and tax computations regarding the taxpayer-
25 witnesses for whom defendant prepared tax returns as well as computations regarding defendant's
26 tax liability pursuant to community property rules applicable in California, and a summary of
27 defendant's outstanding tax liabilities with respect to her filed tax returns. These summaries will
28 be based upon evidence introduced at trial, including witness testimony.

Such summaries themselves can also be properly admitted into evidence. See e.g., United States v. Shirley, 884 F.2d 1130, 1133-34 (9th Cir. 1989). In Shirley, the summary expert witness compiled a summary of telephone records based on information already introduced into evidence. "Summary evidence 'can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of the multitude of witnesses'." Id., at 1133-34 (citing United States v. Lemire, 720 F.2d 1327, 1348 (D.C. Cir. 1983); and United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988) (properly admitting chart detailing long distance calls made by various co-conspirators)); Marchini, 797 F.2d at 766.

Consequently, the United States believes that the court should admit into evidence the testimony of the summary witness and summary schedules to assist the jury in this case.

Because these summaries will be based upon evidence admitted at trial, they will not be finalized until shortly before the Revenue Agent Ramirez testifies. Therefore, final copies of the summary schedules will be provided to the defense shortly before the agent testifies. However, Revenue Agent Ramirez has prepared "draft" schedules reflecting the evidence the Government anticipates will be admitted. These "draft" schedules, which are internal Government work papers and are protected from disclosure pursuant to Rule 16(a)(2) of the Federal Rules of Criminal Procedure. However, in the spirit of discovery, the United States has provided these "draft" schedules to the defendant.

B. Business Records

The Government intends to introduce into evidence domestic business records of various title companies that issued payment by check to defendant in conjunction with her real estate refinancing business, a portion of the bank records involved in the case, records of a local casino showing the defendant's expenditures, and records of the entities showing defendant's tax return preparer registration and compliance with continuing education requirements. These records will be introduced by certification or by a custodian of records.

1. Fed. R. Evid. 803(6) excepts domestic business records from the hearsay rule:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the

1 memorandum, report, record, or data compilation, all as shown by the testimony of the
2 custodian or other qualified witness, unless the source of information or the method or
circumstances of preparation indicate lack of trustworthiness.

3 2. A document is admissible under this Rule if two foundational facts are established:

4 (a) the document was made or transmitted by a person with knowledge at or near the time of the
5 incident recorded, and (b) the document was kept in the course of a regularly conducted business
6 activity. See United States v. Ray, 920 F.2d 562, 565 (9th Cir. 1990), cert. denied, 111 S.Ct. 1084
7 (1991); Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 717 (9th Cir. 1990). In determining
8 if these foundational facts have been established, the court may consider hearsay and other
9 evidence not admissible at trial. See Fed. R. Evid. 104(a) and 1101(d)(1); Bourjaily v. United
10 States, 483 U.S. 171, 178-79 (1987).

11 3. The foundation may be established either through a custodian of records, "other
12 qualified witness," or a certification of authenticity pursuant to Fed. R. Evid. 902(11). The
13 Government has filed certifications of authenticity of domestic business records with the Court
14 (and provided such certifications to the defendant) to lay the foundation of admissibility of the
15 bank records summarized pursuant to Fed. R. Evid. 1006. The Government has also filed with the
16 Court and provided to the defendant certifications of authenticity with respect to the records of the
17 various title companies.

18 4. The Government need not establish precisely when or by whom a business record
19 was prepared; all the rule requires is that the document be made "at or near the time" of the act or
20 event it purports to record. See Ray, 920 F.2d at 565-66; United States v. Huber, 772 F.2d 585,
21 591 (9th Cir. 1985); United States v. Basey, 613 F.2d 198, 201 n.1 (9th Cir. 1979), cert. denied,
22 446 U.S. 919 (1980).

23 **C. Authentication and Identification**

24 1. Fed. R. Evid. 901(a) provides that "[t]he requirement of authentication or
25 identification as a condition precedent to admissibility is satisfied by evidence sufficient to support
26 a finding that the matter in question is what its proponent claims."

27 2. Rule 901(a) only requires the Government to make a prima facie showing of
28 authenticity or identification "so that a reasonable juror could find in favor of authenticity or

1 identification." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991). See also
2 United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989); United States v. Black, 767 F.2d
3 1334, 1342 (9th Cir.), cert. denied, 474 U.S. 1022 (1985). Once the Government meets this
4 burden, "the credibility or probative force of the evidence offered is, ultimately, an issue for the
5 jury." Black, 767 F.2d at 1342.

6 3. Documents Seized in Search Warrant

7 The Government intends to introduce documents seized from the defendant during a search
8 warrant executed at her business through the Internal Revenue Agent search warrant team leader,
9 and documents obtained by a consent search of the garage of her daughter's residence (where
10 defendant stored her business records) through another Internal Revenue Special Agent.

11 To be admitted into evidence a physical exhibit must be in substantially the same condition
12 as when the crime was committed. This determination is to be made by the trial judge and will not
13 be overturned except for clear abuse of discretion. Factors the court may consider in making this
14 determination include the nature of the item, the circumstances surrounding its preservation, and
15 the likelihood of intermeddlers having tampered with it. See Gallego v. United States, 276 F.2d
16 914, 917 (9th Cir. 1960). The Government need not establish all links in the chain of custody of an
17 item or call all persons who were in a position to come into contact with it. See Gallego, 276 F.2d
18 at 917. Alleged gaps in the chain of custody go to the weight of the evidence rather than to its
19 admissibility. See United States v. Jefferson, 714 F.2d 689, 696 (7th Cir. 1983).

20 A duplicate is admissible to the same extent as the original, unless there is a genuine
21 question as to the authenticity of the original or it would be unfair under the circumstances to
22 admit the duplicate in lieu of the original. See Fed. R. Evid. 1003; United States v. Smith, 893
23 F.2d 1573, 1579 (9th Cir. 1990).

24 4. Domestic public documents under seal and certified copies of records of a public
25 agency

26 Certified records under seal of the official records of a public agency do not require
27 extrinsic evidence of authenticity as a condition precedent to admissibility. Fed. R. Evid. 902(1).
28 The United States anticipates offering into evidence certified copies of certain Internal Revenue

1 Service records, including tax returns, Forms 4340, Certificate of Assessment and Payments, and
 2 other Internal Revenue Service Records. These records are self-authenticating and admissible
 3 pursuant to Federal Rules of Evidence 902(1), 902(4), 803(8), and 1005. See also United States v.
 4 Hughes, 953 F.2d 531 (9th Cir. 1992). The Government will also introduce an IRS Certification
 5 of Lack of Record with respect to Gregory Garrett, Jr., which is self authenticating and admissible
 6 pursuant to Fed. R. Evid. 803(10), 902(1) and 902(4). United States v. Neff, 615 F.2d 1235, 1241-
 7 42 (9th Cir. 1980).

8 **D. Defendant's Statements**

9 1. A statement is not hearsay if the statement is offered against a party and is the
 10 party's own statement in either an individual or a representative capacity. Fed. R. Evid.
 11 801(d)(2)(A); United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir. 1981).

12 2. A statement is also not hearsay when it is:

13 a. "a statement by a person authorized by the party to make a statement
 14 concerning the subject" (Fed.R.Evid. 810(d)(2)(C); United States v. Gibson, 690 F.2d 697, 700-01
 15 (9th Cir. 1982)); or

16 b. "a statement by the party's agent or servant concerning a matter within the
 17 scope of the agency or employment, made during the existence of the relationship (Fed.R.Evid.
 18 810(d)(2)(D); United States v. Flores, 673 F.2d 173, 178 (9th Cir. 1982); or

19 c. "a statement by a coconspirator of a party during the course and in
 20 furtherance of the conspiracy" (Fed.R.Evid. 810(d)(2)(E)). Rule 801(d)(2) (E) is applicable to a
 21 co-conspirator's statement made during the pendency of a conspiracy regardless of whether
 22 conspiracy has been charged in the indictment. United States v. Williams, 435 F.2d 642, 645 (9th
 23 Cir.1970).

24 The Government intends to introduce statements made by the defendant and the
 25 defendant's husband who was acting as the defendant's unpaid employee, agent, and co-
 26 conspirator. The statements were made to the Special Agent Cecilia Braga during the undercover
 27 operation. The Government also intends to introduce statements and admissions made by the
 28 defendant to two IRS Special Agents during two interviews conducted with the defendant.

1 Pursuant to Rule 801, none of these statements are hearsay and are admissible against the
2 defendant.

3 3. When the Government admits some of a defendant's prior oral statements, the door
4 is not thereby opened to the defendant to put in all of his out-of-court statements, because when
5 offered by the defendant, the statements are hearsay. Fed. R. Evid. 801(d)(2); United States v.
6 Ortega, 203 F.3d 675, 681 (9th Cir. 2000) (holding a defendant's non-self-inculpatory statements
7 are inadmissible even if they were made contemporaneously with other self-inculpatory
8 statements); see also United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir. 1981) (holding that
9 the district court did not abuse its discretion in excluding evidence pursuant to the Fed. R. Evid.
10 106 because it was irrelevant and inadmissible hearsay); United States v. McCorkle, 511 F.2d 482,
11 486 (7th Cir. 1975) (defendant's exculpatory statements to IRS in failure to file tax return case
12 properly excluded).

13 DATED: September 2, 2008

14
15 Respectfully submitted,
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17
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

FE S. GARRETT,

Defendant.

Case No. 08CR0918-L

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Christopher S. Strauss, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action.

I will cause service of GOVERNMENT'S TRIAL MEMORANDUM on defendant FE S. GARRETT, pro se, by hand-delivery in the United States District Court on September 3, 2008 during the motions hearing set before Hon. M. James Lorenz.

I have caused service of GOVERNMENT'S TRIAL MEMORANDUM on defendant's standby counsel by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Erica Kristine Zunkel
Federal Defenders of San Diego
225 Broadway, Suite 900
San Diego, CA 92101

Erica_zunkel@fd.org

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 2, 2008

/s/ Christopher S. Strauss
CHRISTOPHER S. STRAUSS
Special Assistant United States Attorney